

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

Amendments to Chapter 12-14
Hawaii Administrative Rules
Workers' Compensation
Relating to Rehabilitation

December 20, 2004

1. Section 12-14-1, Hawaii Administrative Rules, is amended by adding a definition of "Usual and customary employment" and amending the definition of "Suitable gainful employment", "Vocational rehabilitation plan", and "Vocational rehabilitation services" to read as follows:

"Suitable gainful employment" means employment [or self-employment within the geographical area where the employee resides, which is reasonably attainable and which offers an opportunity to restore the employee's earning capacity as nearly as possible to that level which the employee was earning at the time of injury and to return the employee to the active labor force as quickly as possible in a cost effective manner, giving due consideration to the employee's qualifications, interests, incentives, future earning capacity, and the present and future labor market.] within a reasonable geographical area to where the injured worker resides, which is reasonably attainable and which offers an opportunity to restore as quickly as possible the injured employee's earning capacity as nearly as possible to that level which the employee was earning at the time of injury, in the most cost effective manner possible, taking into consideration the employee's qualifications, including but not limited to the employee's age, education, previous work history, interests and skills. Suitable gainful employment shall not include vocational or academic instruction specifically designed and intended to make the employee become self-employed.

"Usual and customary employment" means the job performed at the time of the injury.

"Vocational rehabilitation plan" or "plan" means [an approved] a plan prepared by a certified rehabilitation provider [with an employee], approved by the employee and director that is designed to assist the employee to obtain and maintain suitable gainful employment.

"Vocational rehabilitation services" or "services" means services provided in a rehabilitation program to assist an employee to obtain and maintain suitable gainful employment which may include, but shall not be limited to, on-the-job-training, job modification, vocational evaluation, adjustment to disability, counseling, guidance, vocational and personal adjustment, referrals, transportation, training, supplies, equipment, appliances, aid, occupational licenses, and other goods and services needed to assist an employee to obtain and maintain suitable gainful employment." [Eff. 1/1/81; am 1/28/85; am 4/12/93; am] (Auth: HRS §386-72) (Imp: §386-25)

2. Section 12-14-4, Hawaii Administrative Rules, is amended to read as follows:

"§12-14-4 Initial evaluation required prior to submittal of vocational rehabilitation plan. [A provider shall submit an initial evaluation report of the employee to the director and employer within forty-five days from the date of referral or selection. The evaluation shall determine whether the employee requires vocational rehabilitation services to return to suitable gainful employment, shall identify these services and shall state whether the provider can provide these services. The initial evaluation report shall contain:

- (1) An assessment of the employee's:
 - (A) Current medical status;
 - (B) Primary disability;
 - (C) Secondary disabilities;
 - (D) Disabilities not related to the work injury; and
 - (E) Physical or psychological limitations or both. In the event this information is not provided by the treating physician

in a reasonable amount of time,
information from another physician will
be accepted.

- (2) A job analysis addressing the demands of the employee's employment.
- (3) A statement from the provider identifying the employee's vocational handicaps in relation to the employee's ability to:
 - (A) Return to usual and customary employment; and
 - (B) Participate in and benefit from a vocational rehabilitation program.
- (4) A statement from the provider determining the feasibility of vocational rehabilitation services, including:
 - (A) The provider's ability to assist the employee in the employee's efforts to return to suitable gainful employment;
 - (B) An outline of specific vocational rehabilitation services to be provided, justification for the necessity of the services, estimated time frames for delivery of services, and how the effectiveness of these services is to be measured; and
 - (C) How the vocational rehabilitation services directly relate to the employee obtaining suitable gainful employment.
- (5) Enrollment form and Statement of Worker's Rights and Responsibilities form pursuant to section 12-14-35.]

(a) A provider shall submit an evaluation report to the director, employee, and employer for review and approval within thirty days from the date of the employee's referral.

(b) The evaluation shall determine whether the employee requires vocational rehabilitation services to obtain suitable gainful employment, and shall contain the following:

- (1) An assessment by the attending physician or a physician designated by the attending physician, of the employee's:
 - (A) Current medical status;
 - (B) Primary disability;

- (C) Secondary disability;
- (D) Disabilities not related to the work injury;
- (E) Any physical and psychological limitations; and
- (F) Ability to return to usual and customary employment without any modifications to the usual and customary employment, and if unable to return, then the ability to return to work with modifications to the usual and customary employment, including a description of the modifications necessary;
- (2) The provider's assessment of the following:
 - (A) Whether the employee is eligible for vocational rehabilitation services;
 - (B) Whether the employee is able to return to the usual and customary employment;
 - (C) Whether the employer is able to modify or change the employee's duties or workplace to allow the employee to return to work with an earning capacity to the level which the employee was earning at the time of injury;
 - (D) Whether the employee is able to obtain suitable gainful employment without the proposed vocational rehabilitation program;
 - (E) The time set forth in the plan to rehabilitate the employee compared to the training time for the same occupation outside of the vocational rehabilitation program; and
 - (F) Whether the employee, upon the successful completion of the proposed vocational rehabilitation plan, will be employable, where employable means having the skills

and training commonly and currently necessary in the labor market to be suitably gainfully employed on a reasonably continuous basis when considering the worker's age, education, experience, and physical and mental capabilities due to the industrial injuries. The following factors will be considered to determine whether an injured worker meets the requirements of this section:

- (i) The injured worker has demonstrated through employment history to have the required skills to work in the proposed occupation;
- (ii) The specific vocational preparation time of the proposed occupation should be similar to the training time required outside of the vocational rehabilitation program;
- (iii) The work to be performed in the proposed occupation should be similar in nature to work performed by the injured worker in the course of their employment history; and
- (iv) The injured worker's current skills and training level meet the minimum qualifications of the proposed occupation.

(c) The employer may file a written objection to an initial evaluation with the director, copying the employee and the provider within fourteen calendar days from the postmark date of the initial evaluation. The front page of the objection shall be clearly identified as a "INITIAL EVALUATION OBJECTION" in capital letters and may include a copy of the envelope showing the postmark date. The objections shall specify in detail all of the arguments and evidence explaining why the

employer objects to the initial evaluation." [Eff.
1/1/81; am 1/28/85; am 4/12/93; am 11/08/99;
am] (Auth: HRS §386-72) (Imp: HRS §386-
25)

3. Section 12-14-5, Hawaii Administrative Rules,
is amended to read as follows:

**"§12-14-5 [Criteria for an approved vocational
rehabilitation plan.** (a) A provider shall file the
employee's plan with the director for review and
approval. The plan shall be subject to the approval of
the employee. Upon receipt of the plan from the
provider, an employee has ten days to review and sign
the plan. The plan shall be submitted to the employer
and employee and be filed with the director within two
working days from the date of the employee's signature.
A plan shall include a statement of the feasibility of
the vocational goal, using the process of:

- (1) First determining if the employee's usual and
customary employment represents suitable
gainful employment; should it not,
 - (2) Next determining if modified work or other
work with the same employer represents
suitable gainful employment; should it not,
 - (3) Next determining if modified or other
employment with a different employer
represents suitable gainful employment;
should it not, and finally,
 - (4) Providing training to obtain employment in
another occupational field.
- (b) A plan may be approved by the director,
provided it includes:
- (1) A physician's assessment of the employee's
physical limitations, psychological
limitations, and ability to return to work.
In the event this information is not provided
by the treating physician in a reasonable
amount of time, information from another
physician will be accepted;
 - (2) A labor market survey indicating there is
reasonable assurance that the proposed
occupation for which the employee is to be

placed or trained is readily available in the community when placement begins, or there is assurance of reemployment by the employer;

- (3) A job analysis of the proposed occupation, setting forth its duties, responsibilities, physical demands, environmental working conditions, specific qualifications needed for entry level employment, reasonable accommodations, expected estimated earnings, and other relevant information;
 - (4) The nature and extent of the vocational rehabilitation services to be provided, including:
 - (A) Specific services to be provided, justification for the necessity of the services, estimated time frames for delivery of services, and how the effectiveness of these services is to be measured;
 - (B) Criteria for determining successful completion of the vocational rehabilitation plan; and
 - (C) The employee's responsibilities;]
 - (5) Report of tests and copies thereof that have been administered to the employee, including a statement regarding the need for and use of the tests to identify a vocational goal;
 - (6) If retraining, including on-the-job training, is found to be necessary, the estimated cost of retraining, a description of specific skills to be learned or knowledge acquired with specific time periods and clearly defined measurements of success, and the nature, amount, and duration of living expenses as provided in section 12-14-40;
 - (7) Total cost of plan; and
 - (8) The employee's approval of the plan.
- (c) The employer shall have ten calendar days from the postmark date of the plan to submit in writing to the director any objections to the plan. The front page of the objection shall be clearly identified as a "VOCATIONAL REHABILITATION PLAN OBJECTION" in capital letters

in no less than ten point type and may include a copy of the envelope showing postmark date.

(d) The director may approve a plan which does not include all of the requirements of subsections (a), (b) and (c) provided the director finds the plan.

(1) Is in the best interest of the employee;

(2) Contains reasonable assurance the employee will be placed in suitable gainful employment; and

(3) Has been approved by the employee.

(e) In the event the plan requires the purchase of any tools, supplies or equipment, the deadline for purchase shall be included in the plan. Tools, supplies, and equipment are considered to be the property of the employer until the plan is determined by the director to be successfully completed, after which, it becomes the property of the employee.

Included in the plan shall be a statement that should the deadline pass, the purchase shall be made and the employer shall pay for the purchase.

(f) An employee with an approved plan who is determined as able to return to usual and customary employment may choose to complete the plan or request the director take action under section 12-14-9(4) and allow a new plan whose goal must be the employee's usual and customary employment.] **Criteria for approving vocational rehabilitation plan.**

(a) A provider shall submit a vocational rehabilitation plan to the director and the employer within forty-five days from the date the initial evaluation is received. The time to submit a plan may be extended an additional thirty days by agreement of the parties or by determination of the director that there are reasonable grounds to allow the extension. The proposed plan must establish that the vocational rehabilitation is necessary and is the most cost effective and efficient method in returning employee to suitable gainful employment.

(b) The plan shall contain the following:

(1) Detailed description of the nature and extent of the vocational rehabilitation services to be provided and the costs of the services;

(2) Detailed description of any tools, supplies

- and equipment that need to be purchased and the costs of such equipment;
- (3) Justification for the necessity of the services, estimated time frames for delivery of services, and how the effectiveness of these services is to be measured;
 - (4) Specific goals of the vocational rehabilitation plan and the criteria for determining successful completion of the vocational rehabilitation plan;
 - (5) The employee's responsibilities under the vocational rehabilitation plan;
 - (6) Summary of test results and copies thereof that have been administered to the employee, if any, and a statement regarding the need for and use of the tests to identify a vocational goal;
 - (7) If retraining, including on-the-job training is found to be necessary, the estimated cost of retraining, a description of specific skills to be learned or knowledge acquired with specific time periods and clearly defined measurements of success, and the nature, amount, and duration of living expenses as provided in section 12-14-40.
 - (8) A labor market survey establishing reasonable assurance that the proposed occupation for which the employee is to be placed is readily available in a reasonable geographical area to where the injured worker resides, or written assurance of reemployment by the employer;
 - (9) A job analysis of the proposed occupation, setting forth its duties, responsibilities, physical demands, environmental working conditions, specific qualifications needed for entry level employment, reasonable accommodations, expected estimated

earnings, and other relevant information; and

- (10) The employee's and employer's approval if they were obtained prior to the submission of the evaluation report and proposed plan.

(c) A vocational rehabilitation plan shall not be approved by the director unless the following minimum requirements are met:

- (1) All of the required information in Sections 12-14-5 (a) and (b) were submitted;
- (2) The employee is eligible for vocational rehabilitation services;
- (3) The employer is unable or refuses to modify or change the employee's duties or workplace to allow the employee to return to work at the average weekly wage the employee was earning at the time of injury;
- (4) The employee is unable to obtain suitable gainful employment without the proposed vocational rehabilitation program;
- (5) The employee will be employable, as defined by section 12-14-4(b)(2)(F), upon successful completion of the proposed vocational rehabilitation plan;
- (6) The proposed vocational rehabilitation plan is the most cost effective and efficient method to allow the employee to obtain suitable gainful employment;
- (7) The proposed vocational rehabilitation plan does not exceed 104 weeks;
- (8) The proposed vocational rehabilitation plan is not specifically designed to place the injured employee in self-employment.

(d) If the minimum requirements of section 12-14-5(c) are met, the director may approve a plan that is not approved by the employer, provided that the director finds the employer has unreasonably withheld its approval of the plan.

(e) The employee or employer may request the director to reconsider any determination adverse to the requesting party.

(1) The director shall modify or reverse the denial of the plan, if the director finds that based on new evidence or arguments submitted, the proposed vocational rehabilitation plan meets requirements of section (c);

(2) The director shall modify or reverse its approval of the plan, if the director finds that based on the new evidence or arguments submitted, the proposed vocational rehabilitation plan fails to meet requirements of section (c);

(3) The director may modify any vocational rehabilitation plan to assure that it meets the purpose of vocational rehabilitation as set forth in Section 386, H.R.S.

(f) Any plan approved by both the employer and employee shall be approved by the director regardless of whether the plan meets the requirements of section 12-14-5." [Eff. 1/1/81; am 1/28/85; am 4/12/93; am 11/08/99; 12/17/01;

am] (Auth: HRS §386-72) (Imp: HRS §386-25)

4. Section 12-14-8, Hawaii Administrative Rules, is amended to read as follows:

"§12-14-8 Director's action against a certified rehabilitation provider with an unapproved plan. A provider who renders unapproved vocational rehabilitation services [may] shall be required to terminate the services immediately and the director may void the certification of the provider pursuant to section 12-14-19, or take other action under section 12-14-21. Further, no remuneration shall be paid to the provider by the employer." [Eff. 1/1/81; am 1/28/85; am 4/12/93; am] (Auth: HRS §386-72) (Imp: HRS §386-25)

5. Section 12-14-10, Hawaii Administrative Rules, is amended to read as follows:

"§12-14-10 [Vocational rehabilitation plan, revision, or modification considered approved if no action is taken by the director on objections.] Procedures to file an objection to a proposed plan, revision, or modification of an approved vocational rehabilitation plan. (a) The employer may file an objection to a proposed plan, revision, or modification with the director, copying the employee and the vocational rehabilitation counselor within [ten] fourteen calendar days from the postmark date of the plan, revision, or modification. The front page of the objection shall be clearly identified as a "VOCATIONAL REHABILITATION PLAN OBJECTION" in capital letters [in no less than ten point type] and may include a copy of the envelope showing postmark date. The objections shall specify [a rationale] in detail all of the arguments and evidence as to why the plan, revision, or modification should not be approved.

[(b) If no objection to a plan, revision, or modification is filed with the director by the deadline specified in subsection (a), the plan, revision, or modification shall be approved and the employer may not request further reconsideration under section 12-14-48.

(c) If an objection to a plan, revision, or modification is filed with the director and the director takes no action to approve or deny the plan, revision, or modification within twenty one calendar days from the file date of the plan, revision, or modification, the parties shall consider the plan, revision, or modification approved by the director.]"
[Eff. 1/1/81; am 4/12/93; am 11/08/99; 12/17/01;
am] (Auth: HRS §386-72) (Imp: HRS §386-25)

6. Section 12-14-23, Hawaii Administrative Rules, is amended to read as follows:

"§12-14-23 Responsibility. (a) The employee in accordance with section 386-25, HRS, and within the

limits established by section 12-14-36, initially may select and initiate services with any one certified rehabilitation provider as established in section 12-14-16. All subsequent changes or transfers of provider shall be in accordance with section 12-14-52.

(b) Based on sources such as the attending physicians' medical reports or reports by physicians directed by the attending physician, and recommendations by hearings officers, employers, insurance carriers, and others, the director may as expeditiously as possible identify employees who may need vocational rehabilitation and refer these employees to a provider unless the director, in accordance with section 12-14-46, certifies that it is not feasible to rehabilitate the employee.

(c) Within one hundred twenty days from the date of injury, based on [a] the attending physician's medical report, the medical report of physicians directed by the attending physician, and other information, the employer shall provide information on the employee's rights to vocational rehabilitation, instructions on how to select a vocational rehabilitation provider, an employee selection form and a list of current certified vocational rehabilitation providers to the employee. The employee shall have thirty calendar days from the date the employer provides the information to the employee to make a selection. If the employee fails to select, the employer may request a referral from the director.

(d) Upon the employee's selection of a provider of vocational rehabilitation services, the provider has seven calendar days to submit in writing, notification of employee's selection by submittal of the employee selection form to the employer, employee and the director. The employee selection form shall include the employee's name and address, department's workers' compensation case number, employer's name, and the name of the selected provider.

(e) Employers may, within [ten] fourteen calendar days from the postmark date of the employee selection form, challenge an employee's eligibility for vocational rehabilitation benefits by filing written notice to the director, employee and provider, defining the employer's justification for non-eligibility. The

front page of the objection shall be clearly identified as an "ELIGIBILITY FOR VOCATIONAL REHABILITATION OBJECTION" in capital letters [in no less than ten point type] and may include a copy of the envelope showing postmark date." [Eff. 1/1/81; am 1/28/85; am 4/12/93; am 11/08/99; am 12/17/01; am]
(Auth: HRS §386-72) (Imp: HRS §386-25)

7. Section 12-14-30, Hawaii Administrative Rules, is amended to read as follows:

"§12-14-30 Closing report. (a) The provider shall submit a closing report on each case upon the termination of vocational rehabilitation services. The report shall include, but not be limited to, the following:

- (1) Justification for closure[;], including a determination of whether the employee can return to suitable gainful employment;
- (2) A brief description of services provided;
- (3) Length of service;
- (4) Employment information:
 - (A) Name of employer;
 - (B) Date employment began; and
 - (C) Wage information; and
- (5) Signature of the employee "witnessed by" the specialist, including a statement the report has been reviewed with the employee.

[(b) Specialists shall not determine the employee is able to work unless they can document their ability to secure for the employee suitable gainful employment.

(c) Should the employee appear medically able to return to employment but not be employed at the time of vocational rehabilitation case closure, the employee may be referred to another provider for vocational rehabilitation services.

(d)](b) If no objection is received by the director within [ten] fourteen calendar days from the date of the director's closure notice, the closure will be considered final and the employee may not request further reconsideration under section 12-14-48. The front page of the objection shall be clearly identified

as a "VOCATIONAL REHABILITATION CLOSURE OBJECTION" in capital letters [in no less than ten point type]."
[Eff. 1/28/85; am 4/12/93; am 11/08/99; am 12/17/01;
am] (Auth: HRS §386-72) (Imp: HRS §386-25)

8. Section 12-14-48, Hawaii Administrative Rules, is amended to read as follows:

"§12-14-48 Reconsideration and hearing. (a)
Except as otherwise provided, determinations of the rehabilitation unit are considered final unless a written request for reconsideration is filed with the rehabilitation unit within [ten] twenty calendar days from the date of the determination. The front page of the request shall be clearly identified as a "REQUEST FOR RECONSIDERATION" in capital letters [in no less than ten point type]. The request for reconsideration shall specify in detail all of the arguments and evidence as to why the determination of the rehabilitation unit should be reversed or modified. The failure to specify in detail the arguments and evidence as to why the determination should be reconsidered shall result in denial of the request for reconsideration.

(b) [The rehabilitation unit shall issue a reconsideration determination to affirm, reverse, or modify the determination or refer the request for reconsideration for hearing.]The request for reconsideration of a rehabilitation unit determination shall be referred to a workers' compensation hearings officer who shall either set the matter or hearing or request a position statement from the employee or provider specifying in detail the arguments and evidence as to why the determination should be affirmed. If the hearings officer requests position statements, the hearings officer will issue an administrative decision in the name of the director without hearing.

(c) A reconsideration determination is considered final unless [a written request for hearing is filed within ten calendar days from the date of the reconsideration determination. A hearing shall be held

before a hearings officer designated by the director. A written decision shall be issued in the name of the director.] a party files an appeal to the labor and industrial relations appeals board pursuant to section 12-14-49." [Eff. 1/28/85; am 4/12/93; am 11/08/99; am 12/17/01; am] (Auth: HRS §386-72) (Imp: HRS §386-25)

9. Section 12-14-48, Hawaii Administrative Rules, is amended to read as follows:

"§12-14-49 Appellate body and filing period.

[Any party who disagrees with or is aggrieved by a decision of the director may request in writing to the director for a reconsideration of the decision within twenty days from the date of the decision.] The director's decision shall be final unless the appellant appeals to the labor and industrial relations appeals board within twenty days from the date of the director's decision. If still dissatisfied, the appellant may further appeal the board's decision to the state supreme court within thirty days from the date of the board's written decision." [Eff. 1/1/81; am 1/28/85; am] (Auth: HRS §386-72) (Imp: HRS §§386-25, 386-88)

10. Material, except source notes, to be repealed is bracketed. New material is underscored.

11. Additions to update source notes to reflect these amendments are not underscored.

12. These amendments to Title 12, Chapter 14, Hawaii Administrative Rules, relating to Rehabilitation shall take effect ten days after filing with the Office of the Lieutenant Governor.

I certify that the foregoing are copies of the rules drafted in the Ramseyer format, pursuant to the requirements of section 91-4.1, Hawaii Revised Statutes, which were adopted on
() and filed with the Office of the Lieutenant Governor.

Director

APPROVED AS TO FORM:

Deputy Attorney General